ESCHEATING THE SYSTEM: STATES' INCREASED SECURITIES ESCHEATMENT AT INVESTORS' EXPENSE

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ABSTRACT

Recent changes in state unclaimed property law have created a hostile investment landscape. States take property that is deemed "lost" or "unclaimed" through a process called escheatment. States, eager to collect more property through escheatment, have passed laws making it easier than ever to escheat securities, and investors have less time to react and less notice before escheatment happens. After escheatment, states promptly liquidate investors' accounts with no notice, and investors are unable to collect their full appreciated value. This violates the Takings Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, and contradicts the main purpose of unclaimed property law. If this trend in state law towards more aggressive escheatment is not curbed, it will cause significant harm to current and future investors.

This note explains the constitutional issues with states routinely escheating investors' accounts after they are "inactive" for as little as three years, liquidating investors' accounts without notice, and not allowing investors to collect the appreciated value of their accounts when claimed. Further, this note explains the due process issues with states' use of audit firms who are paid large sums based on the amounts of investment accounts they characterize as escheatable. The result is an aggressive state escheatment framework prioritizing state escheatment over safeguarding investors' accounts. This note explains the need for the Supreme Court to rule on the constitutionality of the states' escheatment laws, or for the Securities and Exchange Commission to promulgate rules to better protect investors.

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INTRODUCTION

Walter Schramm was an Italian investor who decided to sell coffee supplies online during the '90s.[1] Unfortunately for Walter, a brand-new company, Amazon, was beginning to dominate online retail.[2] Walter decided, rather than compete with Amazon, to invest in the new company.[3] Using a "buy and hold" strategy recommended by the likes of Warren Buffet, he bought around $6,000 in Amazon stock and held on to the stock for 20 years, when his stock should have been worth around $100,000.[4] When Walter logged on to his account 20 years later, however, his account was empty.[5] His stock was escheated by the state of Delaware in 2008, without his knowledge.[6] When Walter claimed his stock from the state, Delaware did not offer him the appreciated $100,000 value of his stock, but instead offered him $8,000, the amount Delaware received when the state liquidated his shares in 2008.[7]

Unfortunately, stories like Walter's are not uncommon, they represent a state trend to escheat more and more of investors' accounts. In 2002, all 50 states and D.C. were estimated to hold $20 billion in unclaimed property.[8] Today, over $34 billion in unclaimed property is held by only four states: New York, Texas, California, and Massachusetts.[9] Why such an increase in

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[1] Planet Money, *Escheat Show*, NATIONAL PUBLIC RADIO (Jan. 24, 2020, 5:48 PM), https://www.npr.org/2020/01/24/799345159/episode-967-escheat-show [https://perma.cc/7HU2-FKYR].
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] Stephanie Cutler et. al., *What Corporate America Needs to Know About Unclaimed Property: A Primer for the Business Holder*, 54 THE TAX EXEC. 335, 335 (2002).
[9] While the NAUPA no longer maintains a running total of unclaimed property held by states, some states maintain a total on their own state unclaimed property websites. *See Find Lost Money*, NEW YORK STATE, https://www.ny.gov/services/find-lost-money [https://perma.cc/AQ7E-JDVY] (last visited Mar. 3, 2024) (stating New York currently holds $13 billion in unclaimed property); *Texas Comptroller Glenn Hegar Announces*

escheatment? States are using unclaimed property laws to raise revenue–a more politically friendly alternative to raising taxes–contradicting the laws' primary purpose of reuniting property owners with their unclaimed property.[10] States suffering from budget shortcomings, use the increased amounts received from unclaimed property collection to supplement their lack of revenue.[11] This creates a significant conflict of interest, as states' interest in owner protection conflicts with a monetary incentive to enact and interpret unclaimed property laws more favorable for themselves, so they can take possession of more property in order to make more money.[12] This trend to escheat more property at owners' expense raises significant conflict of interest issues and constitutionality concerns.

A. Background

The modern concept of unclaimed property law stems from the old English law of escheat.[13] In old English escheatment law, The Crown took legal right to property deemed "abandoned."[14] Modern escheatment laws are different, as the states only take custody of property, not ownership.[15] The states have no legal right to the property like old English escheatment law, and while they may use the property for the states' benefit while it remains in state custody, they are required to reunite "lost" property with owners when they are found.[16] Unclaimed property laws allow the states to escheat, or transfer into the custody of the state, intangible property as well as

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Record $344 Million in Unclaimed Property Returned in Fiscal 2023, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, https://comptroller.texas.gov/about/media-center/news/20230928-texas-comptroller-glenn-hegar-announces-record-344-million-in-unclaimed-property-returned-in-fiscal-2023-1695240075452 [https://perma.cc/JVC8-MSEE] (last visited Sept. 28, 2023) (stating Texas currently holds $8 billion in unclaimed property); *Unclaimed Property Division Fact Sheet*, MASSACHUSETTS UNCLAIMED PROPERTY DIVISION, https://www.mass.gov/doc/unclaimed-property-division-fact-sheet/download (last visited Mar. 3, 2024) (stating Massachusetts currently holds over $3 billion in unclaimed property); *Controller Yee Celebrates National Unclaimed Property Day*, CALIFORNIA STATE CONTROLLER, https://sco.ca.gov/eo_pressrel_21369.html [https://perma.cc/E2C3-GSDB] (last visited Feb. 1, 2021) (stating California currently holds more than $10.2 billion in unclaimed property).

[10] *See* Am. Express Travel Related Servs. Co. v. Hollenback, 630 F. Supp. 2d 757 (E.D. Ky. 2009), *vacated sub nom.* Am. Express Travel Related Servs. Co. v. Ky., 641 F.3d 685 (6th Cir. 2011) ("clear evidence that the state legislature enacted the abandoned property law as an effort to raise revenue . . . rather than to reunite citizens with lost property"); *See* Unif. Unclaimed Prop. Act, Prefatory Note (UNIF. L. COMM'N 2016).

[11] Brief for Unclaimed Prop. Pros. Org. as Amicus Curiae Supporting Petitioners, at 3, 9, Taylor v. Yee, 136 S. Ct. 929 (2015) (No. 15-169), 2015 WL 5265281.

[12] Daniel Whipple, *It's Time to Reform Escheatment of Mutual Fund Shares*, STATE TAX NOTES, Aug. 2015, at 487.

[13] *See* Unif. Unclaimed Prop. Act, Prefatory Note (UNIF. L. COMM'N 2016).

[14] *Id*.

[15] *Id*.

[16] *See* New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 383 (3d Cir. 2012) ("The purpose of unclaimed property laws is to provide for the safekeeping of abandoned property and then to reunite the abandoned property with its owner").

physical property, which includes checking or savings accounts, stocks, certificates of deposit, and other securities.[17] Each state has their own version of unclaimed property laws, with the majority of state statutes being based on versions of the Uniform Law Commission's proposed uniform property acts, as amended over the years.[18] For a state to escheat securities, the securities must sit unclaimed for a certain amount of time, in most states three years, called a "dormancy period."[19] A "trigger event" will start the dormancy period, and at the end of the dormancy period the states will escheat the securities.[20] After escheatment, the state will liquidate the securities, either immediately or after a short period of time.[21]

1. Current Trend

The rationale behind modern unclaimed property laws is to allow states to safeguard unclaimed property for the benefit of the property owner.[22] Unclaimed property law thus has two primary purposes: preserving owners' property rights while the owner is lost, and reuniting the owner with their property when they are found.[23]

However, a third purpose has recently become increasingly important to states: using unclaimed property for public use.[24] States use unclaimed property as a major source of revenue, often making up significant portions of state budgets.[25] These are not small amounts of revenue for the states; unclaimed property makes up Delaware's third largest and California's fifth largest source of money for state budgets.[26] While using unclaimed property for public use can be beneficial for states, this objective is less important than the primary two objectives: safeguarding property and reuniting property owners.[27]

Many people are unaware that states are in custody of their securities or have liquidated them. An estimated one in seven Americans currently have

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[17] *What is Unclaimed Property?*, NAT'L ASS'N OF UNCLAIMED PROP. ADM'RS, https://unclaimed.org/what-is-unclaimed-property/ [https://perma.cc/Z8FE-69UY] (last visited Mar. 3, 2024).
[18] Cutler et al., *supra* note 8.
[19] *Id*. at 336; Whipple, *supra* note 12, at 491.
[20] *Id*.
[21] Whipple, *supra* note 12, at 488.
[22] *See* Unif. Unclaimed Prop. Act, Prefatory Note (UNIF. L. COMM'N 2016).
[23] *New Jersey Retail Merchants Ass'n*, New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 383 (3d Cir. 20120.
[24] Whipple, *supra* note 12, at 490.
[25] *Id.* at 487, 489.
[26] DELAWARE.GOV, FINANCIAL OVERVIEW (2023), https://budget.delaware.gov/budget/fy2023/documents/operating/financial-overview.pdf?ver=0321 [https://perma.cc/F75U-KFGJ] (Delaware would likely bring in $365 million in abandoned property in 2023, making it Delaware's third largest source of money received); Mac Taylor, *Unclaimed Property: Rethinking the State's Lost & Found Program*, LEGISLATIVE ANALYST'S OFFICE (Feb. 10, 2015), https://lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf [https://perma.cc/DTV3-YEUJ] (in 2015 unclaimed property generated $400 million in annual revenue for California, making it California's fifth largest source of revenue).
[27] Whipple, *supra* note 12, at 490.

unclaimed property held by a state.[28] Because many people are unaware their property has been escheated, and despite many unclaimed property resources available, only a small fraction of people who have their securities escheated are reunited with their accounts by states.[29] This note will focus on the legal issues with the current state escheatment landscape, and propose solutions to better protect investors while maintaining the benefits of unclaimed property law.

I. INADEQUATE NOTICE BEFORE STATES ESCHEAT AND LIQUIDATE SECURITIES

A. Inadequate Notice When Using RPO Standard

There are several significant legal issues with the current state escheatment framework. One critical issue is the states' failure to provide constitutionally adequate notice to investors before escheating and liquidating their securities. Many state unclaimed property laws, based on The Revised Uniform Unclaimed Property Act ("RUUPA"), use the "Returned by Post Office" ("RPO") standard to begin the dormancy period, or countdown until escheatment.[30] The dormancy period begins when "mail to the apparent owner is returned to the holder undelivered."[31] Once the dormancy period ends, the RUUPA recommends that states send notice by first class mail to investors warning them that their securities have been escheated.[32]

This raises constitutional due process concerns because mail has already been sent to the investor and been returned undelivered by the post office when the dormancy period began under the RPO standard, so when states send notice of escheatment, it will most likely never reach the investor. Investors, like any other property owners, are guaranteed by the Fourteenth Amendment that a State shall not deprive them of their property without due process of law.[33] The Supreme Court has held that, to satisfy due process for notice, "the means employed [for notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[34] For a state to give notice, it must be "reasonably calculated" to reach the

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[28] NAT'L ASS'N OF UNCLAIMED PROP. ADM'RS, *supra* note 17.
[29] Michael I. Saltzman, *Providing Protection in State Unclaimed Property Audits*, TAX NOTES 1600 (Dec. 18, 2000), https://www.americantaxpolicyinstitute.org/wp-content/uploads/2017/02/saltzman.pdf [https://perma.cc/4B9T-Y7WD]; Readers of this note are highly encouraged to check missingmoney.com or their state's unclaimed property website and conduct a free search for property that may be waiting to be collected.
[30] *See, e.g.*, Unif. Unclaimed Prop. Act, § 204(a)(1) (UNIF. L. COMM'N 2016).
[31] *Id*.
[32] *Id*. at § 503(a)(1).
[33] U.S. CONST. amend. XIV.
[34] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950).

interested party, here investor, "process which is a mere gesture is not due process."[35]

States' notice is not "reasonably calculated" to reach the investor here because states know that mail is already not reaching the intended recipient under the RPO standard. How are investors supposed to know their investments have been escheated if they are already not receiving their mail? Supreme Court Justice Alito agreed that current escheatment notice is not adequate, writing, "[t]his trend–combining shortened escheat periods with minimal notification procedures–raises important due process concerns."[36] Justice Alito also wrote that with more and more technology available to states enabling them to reach out to investors facing escheatment, "many States appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property." Escheatment notice sent to invalid addresses violates investors' due process because they never learn that their accounts have been escheated and, therefore, have no ability to prevent escheatment from happening.

Escheatment equates to a transfer of custody of investors' securities; therefore, if investors learn that their securities have been escheated, they can claim their accounts from the state. While notice of escheatment is essential and likely unconstitutional in its current state, the true harm to investors is not when holders turn securities over to the states. The true significant harm occurs when the states liquidate investors' accounts.

B. Lack of Notice Before Liquidation

Because the true harm to investors is not the transfer of custody of their accounts to the state, but rather the liquidation, notice sent at this step is arguably more important than when escheatment happens. Investors, who often use securities accounts for valuable objectives such as retirement, will be unaware that their securities have been liquidated without the constitutionally adequate due process they deserve.

If notice of liquidation is sent at all, it is often sent to the same address as the address that triggered the RPO standard, and this second notice, notifying the escheated security owner that their securities will be liquidated, is again invalid because the state already knows that notice is not reaching the owner.[37]

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[35] *Id.* at 314–15.

[36] Taylor v. Yee, 136 S. Ct. 929, 930 (2016) (Alito, J., concurring in denial of certiorari) (note that while the petition for certiorari for the Supreme Court to hear a case regarding the constitutionality of a California Unclaimed Property law was denied, Justice Alito stated that the question was important, the case history was just too convoluted to try specific case at hand).

[37] Ethan Millar et al., *The Revised Uniform Unclaimed Property Act is an Improvement, but Constitutional Defects Should be Addressed Before Approval*, BUSINESS LAW TODAY (Feb. 2018), https://www.americanbar.org/groups/business_law/resources/business-law-today/2018-february/the-revised-uniform-unclaimed-property-act/.

Unfortunately, notice is often never sent before liquidation, the true harm or "taking" of investors' securities. The RUUPA does not recommend that any notice be sent to investors before the state liquidates their securities.[38] Additionally, many states' escheatment laws, such as California's, also do not require notice to be sent to investors before liquidation.[39]

A lack of any notice before investor's securities are liquidated is an unconstitutional lack of due process. Investors will not be able to prevent their securities from being sold if they never learn of an upcoming liquidation by the state. The Supreme Court held in *Jones v. Flowers* that property owners are afforded notice before their property is sold within the context of a tax sale.[40] the Supreme Court wrote that notice before a sale of assets in possession of a state is constitutionally required, and states must take additional steps to notify: "[W]hen mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."[41] In *Jones*, the court held that because proper notice was not sent out before the sale of a home, constitutional due process was not met.[42]

Escheatment is very similar to the tax sale in *Jones*; if informing a property owner before their house is sold is required to meet due process, adequate notice should be sent to investors before their accounts are liquidated to meet due process as well. A lack of adequate notices of escheatment and liquidation do not meet the Supreme Court's understanding of constitutional due process and do not adequately protect the investors.

II. STATES ARE USING INACTIVITY STANDARD BEFORE ESCHEATING

A. What is Inactivity?

A second major legal issue in the current state escheatment framework is states' use of an "inactivity" standard. Unlike the RPO standard where states must wait for mail to be returned to the holder as undeliverable before states escheat investors' accounts, when using an "inactivity" standard, the states instead escheat securities when investors are considered "inactive" for certain amounts of time.[43] Under the guise of investor protection, states assume that "inactive" investors need their accounts protected by having them placed state custody. After Delaware was the first state to adopt an "inactivity" standard in 2008, seventeen states have changed to "inactivity"

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[38] Unif. Unclaimed Prop. Act § 702 (UNIF. L. COMM'N 2016); *id.*
[39] CAL. CIV. PRO. CODE §§ 1501.5(c), 1516 (2023) (do not require any notice before liquidation).
[40] Jones v. Flowers, 547 U.S. 220, 225 (2006).
[41] *Id.*
[42] *Id.* at 239
[43] Whipple, *supra* note 12, at 489.

standard,[44] and many more states are proposing legislation to move to similar standards.[45]

Under an "inactivity" standard, states escheat securities even when mail is being successfully delivered to a security holder, and the state knows of the current address of the investor, "potentially harming a diligent and fully oriented investor."[46] When states use the "inactivity" standard, they escheat securities from investors who are not "lost," and states are often aware of their address.[47] In a comment to the ULC, a representative from the ICI wrote, "when the state utilizes a[n inactivity] standard as the trigger for deeming an owner lost, [holders] have encountered situations where they have a valid address on an owner but are forced by state law to escheat the property because the owner of the account has not affirmatively contacted the fund company."[48] This is an obvious conflict with the primary purpose of unclaimed property law: reuniting unclaimed property with investors. How can states say they are purporting to reunite investors if they escheat investors' accounts with actual knowledge of where the investors are living?

Actions investors need to take for their accounts to be considered "active" vary by state, but generally require some user generated activity within the span of a certain amount of time, which could include cashing a dividend check, buying or selling shares, writing to or speaking with the holder, or accessing their account online.[49] Actions that seem like they would make an investor active do not constitute activity can include receiving notices regarding investments at investors' home addresses, receiving automatic dividend checks back into investment accounts, and even certain actions such as participating in proxy votes.[50]

Additionally, many investors are moving away from physical checks and use automatic clearing house (ACH) deposits instead, which some states do

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[44] *See id. at* 491–92 (The following states now use an "inactivity" standard: California, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oregon, Rhode Island, and South Dakota).

[45] Jennifer Borden, *2022 Unclaimed Property Year-End Round Up*, THE SHAREHOLDER SERVICE OPTIMIZER (Dec. 26, 2022), https://optimizeronline.com/2022-unclaimed-property-year-end-round-up/ [https://perma.cc/9JZU-U7Q8].

[46] Whipple, *supra* note 12.

[47] *Id.*

[48] *Id*. at 488 (citing Inv. Co. Inst., Comment Letter on Revised Uniform Unclaimed Property Act (Dec. 29, 2014)).

[49] Paul Griffith & Michael Ryan, *Fighting Escheatment of Securities for "Inactivity,"* COMPUTERSHARE (Jul. 28, 2015), https://www.computershare.com/us/news-insights/insights/industry-regulatory/fighting-escheatment-of-securities-for-inactivity [https://perma.cc/7NUQ-4MXS].

[50] Brief for S'holder Serv. Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Petitioners at 12, Taylor v. Lee, 136 S. Ct. 929 (2016) (No. 15-169).

not count as activity either.[51] Investors, some of whom may be moving away from physical checks due to increasing check fraud,[52] may find their securities escheated because they wanted to take safer measures. Automatic deposits–cheaper, easier, and more efficient–are also safer from fraud, yet some states still require investors to use physical checks to be considered "active."[53]

States' requiring "activity" is bad news for investors, as many investors use, with recommendations from experts in the field, "buy and hold" or "set it and forget it" strategies where they are encouraged to leave securities alone in investment accounts with little or no contact until they are ready to sell their securities and benefit from the returns.[54] Many investors, often for retirement, will purposefully hold securities for extended periods as passive investors, withholding from regularly buying or selling securities to maximize their return.[55]

Unfortunately, under the "inactivity" standard, this passive investment strategy can put investors in real danger of having their securities escheated. Coupled with the danger of securities being liquidated without notice, investors often learn that their accounts are empty years after they deposited their initial investment.[56] Investors should not be burdened with a responsibility to maintain some level of activity. Investors should not have to worry about securities they have purposefully bought to hold for a long time being sold by states without notice. Because many investors stash securities away for retirement, "inactivity" standards could disproportionately affect investors who do not regularly check their accounts but rather trust that their securities are safe.

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[51] *See* Brief for S'holder Serv. Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Appellant at 22, Warner v. Hillsborough County Clerk of Courts, Case No. 8:22-cv-01977-MSS-SPF (11th Cir.) (No. 24-10748) 2024 WL 2844159 (citing 765 ILL. COMP. STAT. ANN. 1026/15-210(b) (2018)) (Illinois statute not considering automated clearing house debit or credit to an investor's account as activity).

[52] *See FDIC Consumer News: Beware of Face Checks*, FED. DEPOSIT INS. CORP. (Aug. 26, 2019), https://www.fdic.gov/consumers/consumer/news/august2019.html [https://perma.cc/KEK3-S68N].

[53] Derek Silva, *All About ACH Payments*, SMARTASSET (Mar. 19, 2023), https://smartasset.com/checking-account/all-about-ach-payments [https://perma.cc/VP8D-P8CN ("ACH payments are faster, cheaper, more reliable and more secure").

[54] Edward Bernert et. al., *An Examination of Unclaimed Property Laws After the Adoption of RUUPA: Suggestions for Continued Advancement*, 71 TAX L. 941, 962 (2018); Rick Ferri, *Set it and Forget it Works*, FORBES (Jun. 11, 2015) https://www.forbes.com/sites/rickferri/2015/06/11/set-it-and-forget-it-works/?sh=712d80ff6e61.

[55] Brief for S'holder Serv. Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Petitioners, *supra* note 50, at 4.

[56] Planet Money, *supra* note 1.

B. Investors' Right to Hold Property

States' liquidation of investors' accounts after periods of inactivity imposes on investors a burden of activity that can harm long-term investments. The Supreme Court recognized in *Texaco Inc. v. Short* that while certain property, like the mineral interest in the case, are expected to be "used," certain property is not, writing, "[w]e need not decide today whether the State may indulge in a similar assumption in cases in which . . . the interest affected is such that concepts of 'use' or 'nonuse' have little meaning."[57] If any property should be afforded the protection of "nonuse," it should be investment accounts. Not only do experts recommend "set it and forget it" investment strategies, but it can be financially beneficial for investors to do so.[58] Some property, like real property, is expected to be used to realize a benefit, but securities are much more likely to sit unused for years before investors realize their benefit and should therefore be afforded the privilege of nonuse.

Further, the Supreme Court held that forfeiture of a property requires an act, not a period of inactivity, in *Tyler v. Hennepin County.*[59] The court in *Tyler* stated that "[a]bandonment requires the 'surrender or relinquishment or disclaimer of' all rights in the property."[60] Investors who have their accounts escheated and liquidated are not "surrendering" their rights in their investment accounts or taking any actions regarding their accounts at all. States should not interpret investors' lack of active trading in their accounts as an indicator of abandonment, but rather a safe and intelligent investment strategy.

The inactivity standard also disproportionately impacts foreign investors, who may invest in American accounts without maintaining a certain level of inactivity. Foreigner investors "own over *$6 trillion* in U.S. corporate stock, and states escheat hundreds of millions (if not billions) of dollars of such stock per year."[61] Foreign investors are almost certainly unaware that they must maintain some level of "activity" to prevent their accounts from being escheated. Further, letters sent in English to foreign investors by slow mail may not be adequate to warn them to stay "active." The constitutionality of foreign escheatment has been debated,[62] and is outside the scope of this note, but "inactivity" standards certainly harm foreign investors who may not even be familiar with the concept of escheatment.

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[57] Texaco, Inc. v. Short, 454 U.S. 516, 535 (1982).
[58] Rick Ferri, *Set it and Forget it Works*, FORBES (Jun. 11, 2015) https://www.forbes.com/sites/rickferri/2015/06/11/set-it-and-forget-it-works/?sh=712d80ff6e61.
[59] Tyler v. Hennepin Cnty., 598 U.S. 631, 647 (2023).
[60] *Id* (*citing* Rowe v. Minneapolis, 49 Minn. 148, 157 (1892)).
[61] Millar et al., *supra* note 37.
[62] *Id*.

C. *Disingenuous Interpretations of State Law*

In addition to "inactivity" standards harming passive investors, inactivity standards for some securities, such as brokerage accounts, are based on disingenuous interpretations of state escheatment law. In order to implement the "inactivity" standard for brokerage accounts, states have been "rely[ing] upon ambiguous escheat statutes or disingenuous interpretations of these statutes and demand shares be turned over to the states even when the shareholders are not lost, and they have not abandoned the shares."[63]

Some states have determined that shares held in brokerage accounts are not "securities" at all, and therefore, owners of brokerage accounts do not need to be "lost" before their accounts can be escheated.[64] This will also circumvent certain protections afforded specifically for "securities," such as SEC Regulation § 240.17Ad–17.[65] In the '90s, the SEC promulgated regulation 240.17Ad-17, which requires transfer agents and broker-dealers to exercise reasonable care in finding lost security holders in order to "lessen the risk of unnecessary property loss."[66] Under § 240.17Ad-17, owners of securities are only considered "lost" if mail is sent and returned two separate times and the holder is unable to find the investor's address after searching at least two national databases during a certain amount of time.[67] States have "historically respected 17 C.F.R. § 240.17Ad-17," but recently have changed interpretations of certain securities to escheat shares.[68]

By not considering shares held in brokerage accounts as "securities," these states do not need to wait for holders to employ the protections of 240.17Ad-17, and can escheat brokerage accounts even if the owners of the accounts are not "lost," leading to a significant increase in securities escheated.[69] State laws have historically afforded protections like the RPO standard specifically to securities, and to circumvent this states have purposefully refused to classify shares held in brokerage accounts as "securities" and are then free to apply the "inactivity" standard instead of the RPO standard.[70]

States have continued to do this even eight years after the RUUPA was adopted, despite the RUUPA's classification that "security" includes shares

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[63] Brief for S'holder Serv. Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Petitioners, *supra* note 50, at 4.
[64] Borden, *supra* note 45.
[65] Borden, *supra* note 45; 17 C.F.R. § 240.17Ad–17 (2013).
[66] 17 C.F.R. § 240.17ad-17; DST Asset Manager Sols., Inc., Exchange Act Release No. 34-98153 (Aug. 17, 2023).
[67] 17 C.F.R. § 240.17Ad–17 (2013).
[68] Brief for S'holder Servs.Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Petitioners, *supra* note 50, at 15.
[69] *Id* (*citing* Letter from Mark Udinski, State Escheator, Delaware Dep't of Revenue, to Charles Rossi, President, The Sec. Transfer Ass'n 16 (May 10, 2012)); Bernert et al., *supra* note 54, at 963–64.
[70] Edward Bernert et. al., *supra* note 54, at 963–64.

held by broker-dealers and should therefore receive the RPO standard.[71] States have also refused to consider brokerage accounts "securities" even though the SEC considers shares held by broker-dealers to be securities.[72] States' intentional redefinition despite opposite guidance from the RUUPA and the SEC is an attempt to make state law more escheatment friendly and strip certain protections from investors.

This redefining of securities by states directly harms security holders, as most Americans do not hold stock directly but instead rely on brokerage accounts,[73] no longer considered "securities" by the states. Investors who invest in brokerage accounts are now failing to receive protections that other securities investors receive and can have their brokerage accounts escheated even though the state does not consider them "lost." This directly harms investors who trust brokers to handle their investments and trust the states to only escheat their securities if they cannot be found.

States are using the "inactivity" standard not to increase investor protection but to receive more securities accounts through escheatment. One study estimated that states using an "inactivity" standard instead of an RPO standard would result in the escheatment of up to five times as much securities.[74] According to the Delaware Fiscal Notebook, after implementing an "inactivity" standard for securities, Delaware's unclaimed property revenue went up 77.3%, from roughly $320 million in 2012 to over $560 million in 2013.[75] While there is nothing unconstitutional about states receiving more property through escheatment, prioritizing receiving more property over safeguarding and reuniting investor's with their property is contradictory with the main rational of unclaimed property. "Inactivity" standards will continue to harm many investors, causing their investment accounts to be escheated and liquidated by the state without consent from investors or notice from the states.

III. SHORTENING DORMANCY PERIODS

A third major issue with the current state escheatment framework is shortening dormancy periods before states escheat securities. States have been drastically shortening the period accounts must sit "inactive," or the

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[71] REV. UNIF. UNCLAIMED PROP. ACT § 102(27) (UNIF. L. COMM'N 2016).
[72] *Investor Bulletin: Holding Your Securities*, SEC. & EXCH. COMM'N (July 11, 2023), https://www.sec.gov/about/reports-publications/investor-publications/holding-your-securities-get-the-facts.
[73] Teresa Ghilarducci, *Most Americans Don't Have A Real Stake In The Stock Market*, Forbes (Aug. 31, 2020), https://www.forbes.com/sites/teresaghilarducci/2020/08/31/most-americans-dont-have-a-real-stake-in-the-stock-market/ [https://perma.cc/KQ2J-QMBL] (14% of American families have direct stock market investments, and 52% have indirect investments).
[74] Whipple, *supra* note 12; Debbie L. Zumoff, "Inactivity vs. Returned Mail," Presentation to the 2011 UPPO Annual Conference, 4 (Mar. 6-9, 2011).
[75] STATE OF DEL. DEP'T OF FIN., STATE OF DEL. STATEMENT OF GEN. FUND RECEIPTS AND REFUND DISBURSEMENTS BY MAJOR CATEGORY, (2013) https://financefiles.delaware.gov/docs/06_13.pdf.

period after receiving undelivered mail if using the RPO standard, before states escheat securities.[76] While some dormancy periods used to be as long as thirty years,[77] many states, including New York, Michigan, Indiana, New Jersey, and Arizona have recently changed their dormancy periods to be as low as three years,[78] and now the majority of states have a three year dormancy period for mutual funds.[79] The RUUPA recommends dormancy periods for securities from five years to three years, although as mentioned above it does so while recommending an RPO standard, not an inactivity standard.[80]

Shortening dormancy periods before states can escheat securities raises several legal concerns. The Uniform Unclaimed Property Acts recommend shorter dormancy periods for securities because the rationale surrounding securities escheatment law is based on "unclaimed" property and not "abandoned" property.[81] Older laws dealing with abandoned property had much longer dormancy periods, such as the twenty-year dormancy period in the seminal unclaimed property case, *Texaco, Inc. v. Short*, where the state liquidated abandoned property.[82] The Uniform Acts state laws mix both theories and use the theory of "unclaimed" property to enact shorter dormancy periods, but use the theory of "abandoned" property to then liquidate the securities after the dormancy period expires.[83]

The ABA recognized the harm a shorter dormancy period mixed with liquidation could create and suggested a seven-year dormancy period for securities in 2018, in addition to an RPO standard for added protection.[84] Unfortunately, states have been less than eager to adopt the ABA's recommendation. Mixing short dormancy periods with liquidation creates an exceptionally hostile landscape for investors, enabling states to escheat investments after a short period, and then sell them, in some cases, immediately after.

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[76] *See* T. Conrad Bower*, Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework,* 74 OHIO ST. L.J. 515, 529 (2013) (providing examples of legislature shortening dormancy periods for various securities to three years).
[77] *See, e.g.*, Provident Inst. for Sav. v. Malone, 221 U.S. 660, 664 (1911) (certain deposits could only be escheated after a thirty-year holding period).
[78] *See* Bower, *supra* note 76.
[79] Whipple, *supra* note 12, at 489.
[80] Revised Unif. Unclaimed Prop. Act, Art. 2 § 208 (2016).
[81] Millar et. al, *supra* note 37.
[82] Texaco, Inc. v. Short, 454 U.S. 516, 518 (1982).
[83] Millar, et al., *supra* note 37.
[84] MODEL UNCLAIMED PROPERTY ACT § 207 (AM. BAR ASS'N, PROPOSED OFFICIAL DRAFT 2018).

Shortening dormancy periods also raises significant due process concerns.[85] The Seventh Circuit recognized the problem with a three-year dormancy period, calling it "a period so short as to present a serious question whether it is consistent with the requirement in the Fourteenth Amendment that property not be taken without due process of law, implying adequate notice and opportunity to contest."[86] When investors' securities are escheated after only a few years, it creates situations where investors' accounts are liquidated before they are even aware that their securities have been escheated. Investors often check their accounts only every few years, and with increasingly shortening dormancy periods, if investors do not maintain some level of "activity" every three years, their securities will be escheated and liquidated.

States are accelerating dormancy periods for accounts of deceased owners.[87] This is problematic, as securities may be liquidated before deceased owners' heirs realize that they have been escheated. In Illinois, dormancy periods for certain securities are as low as two years if the owner is presumed deceased.[88] These extremely short, accelerated, dormancy periods create situations where deceased investors' securities are escheated and liquidated by states rapidly without giving heirs adequate time to become aware and take possession of the deceased owners' accounts.

The rationale behind shortening dormancy periods is clear: states are shortening periods in order to receive escheated property faster.[89] The Pennsylvania state legislature expressly stated this, expecting to generate $150 million more in 2014 as a result of shortening the dormancy period from five years to three years.[90] While states using truly unclaimed property for public use can be beneficial, shortening dormancy periods to receive more property is antithetical to the true purpose of unclaimed property laws, the protection of investors and safeguarding of their property.

The combined effect of shortening dormancy periods with "inactivity" standards creates a worse problem; not only can investors have their securities escheated just because they are "inactive," they do not have to be inactive for long. The RUUPA proposed a shorter dormancy period only because it recommended the RPO standard; it did not recommend a shorter dormancy period combined with an "inactivity" standard,[91] a dangerous

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[85] *But see* Teagan Gregory, *Unclaimed Property and Due Process: Justifying "Revenue-Raising" Modern Escheat*, 110 MICH. L. REV. 319, (Nov. 2011) (arguing that shortening dormancy periods have a legitimate state interest and do not violate due process).
[86] Cerajeski v. Zoeller, 735 F.3d 577, 582 (7th Cir. 2013).
[87] Borden, *supra* note 45.
[88] 765 ILL. COMP. STAT. ANN. 1026/15-203(b) (2024).
[89] Brief for Unclaimed Prop. Pros. Org. as Amicus Curiae Supporting Petr.'s, Taylor v. Yee, *supra* note 11, at 9.
[90] *See* Brief for The Hospital and Healthsystem Assoc. of Penn. as Amicus Curiae Supporting Appellee, Commonwealth of Pennsylvania. v. Philip Morris USA Inc., et al., 114 A.3d 37 (2014) (Nos. 803 C.D. 2014 & 804 C.D. 2014) (*citing* H.R. Comm. on Appropriations, *Fiscal Note on House Bill No. 278* (Pa. 2014)).
[91] Rev. Unif. Unclaimed Prop. Act § 202 (Unif. L. Comm'n 2016).

combination for investors. Using the inactivity standard with a short dormancy period creates a hostile landscape for investors because they can have their investments escheated after being "inactive" for as little as three years, states will escheat their property even though mail is being delivered to the investor and the investor is not considered "lost," and the investors' property is liquidated in some cases immediately upon receipt by the state.

IV. PROMPT LIQUIDATION

A fourth legal issue with state escheatment is states' prompt liquidation of escheated securities. States do not have to wait long for liquidation: many states allow for the immediate liquidation of securities upon escheatment, while others have short waiting periods.[92] While the primary purpose of escheatment should be safeguarding accounts for investors' benefit, states quickly liquidate securities accounts for public use,[93] causing investors to lose years of securities appreciation without the chance to get it back.[94] Loss of appreciated value can be life-changing for investors, and can easily be in the millions of dollars.[95] State Unclaimed Property statutes claim to hold property for investor's benefit, such as California's statute that states the "Controller holds the unclaimed property in trust for the owner who may claim it at any time."[96] The states however, including California, do not safeguard the securities but instead promptly liquidate them and give back only the value the state received from the liquidation, not appreciated value over time.[97] The states' prompt liquidation of escheated securities does not give investors time to collect their securities once escheated and is contradictory to a main purpose of unclaimed property law, to safeguard the property for the benefit of the owner.

V. LACK OF MAKE WHOLE PROVISIONS

A fifth significant legal issue with the current securities escheatment framework is states' lack of "make whole" provisions. These provisions allow investors to receive the current appreciated value of securities instead of the past value when escheatment occurred.

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[92] Brief for S'holder Serv. Assoc. & Sec. Transfer Assoc. as Amici Curiae Supporting Petitioners, *supra* note 50, at 11–12 (many states have between a one- and three-year waiting period, while many others have no waiting period).
[93] Brief for S'holder Serv. Assoc. & Sec. Transfer Assoc. as Amici Curiae Supporting Petitioners, *supra* note 50, at 11.
[94] Whipple, *supra* note 12.
[95] Brief for S'holder Serv. Assoc. & Sec. Transfer Assoc. as Amici Curiae Supporting Petitioners, *supra* note 50, at 7, *citing* Complaint, JLI Inv. S.A. v. Cook, 2015 WL 4274136 (Del. Ch. 2015) (alleging that shareholder lost over $13 million in appreciated value).
[96] Taylor v. Yee, 780 F.3d 928, 932–33 (9th Cir. 2015).
[97] *See, e.g.*, CAL. CIV. PROC. CODE § 1563(b) (West, 2024).

Many states are changing their laws to not include "make whole" provisions.[98] This practice is unconstitutional, as the Takings Clause of the Fifth Amendment prohibits the states from taking private property without just compensation.[99] Just compensation in this case should be the inclusion of "make whole" provisions. The Supreme Court has held that the classic taking is one "in which the government directly appropriates private property for its own use."[100] Liquidation of securities after escheatment is a taking here, because the states sell securities for their own use. They even register the securities in the name of the state and cancel the original owner's certificate before liquidating the securities.[101] The property is then used for states' own benefit, making it a taking.

States cite *Texaco* and argue that there is no taking because the securities are abandoned. However, *Texaco* can be differentiated as *Texaco* dealt with abandoned property (normally having a much longer dormancy period, such as the twenty year statute in *Texaco*) and modern escheat statutes deal with unclaimed property (normally having a much shorter dormancy period).[102] States cannot say that securities are abandoned here to avoid the protection of the takings clause, and then use the inactivity standard, because *Tyler* requires an overt act for property to be deemed abandoned.[103] States using the inactivity standard wait for inactivity, not an act indicating abandonment. States are mixing theories to get the best of both worlds. Because the securities in modern escheatment law are deemed unclaimed by states and not abandoned, owners of securities accounts should be afforded the just compensation protection of the Takings Clause. They should receive the appreciated value of their securities when they collect their accounts from the state.

Because a taking is established, to meet the just compensation requirement of the Fifth Amendment, States should include "make whole" provisions. Once owners' rights in the securities are escheated and sold, they no longer have a right to the securities or the ability to profit from the years of security appreciation. States' refusal to give appreciated value does not rightfully compensate investors, as just compensation is putting the owner "in as good [a] position pecuniarily as he would have occupied if his property had not been taken."[104] The states should allow investors to collect the current value of their securities as if they were never escheated. The Supreme

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[98] Borden, *supra* note 45 (several states have passed or introduced legislation that reduce time before states can liquidate securities and allow states to pay the value when sold, not when investors collect).
[99] U.S. CONST. amend. V; s*ee* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 36–37 (1897) (incorporating the Takings Clause to the states).
[100] E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) (citing United States v. Sec. Indus. Bank, 459 U.S. 70, 78 (1982)).
[101] Brief for S'holder Serv. Assoc. & Sec. Transfer Assoc. as Amici Curiae Supporting Petitioners, *supra* note 50, at 10.
[102] Texaco, Inc. v. Short, 454 U.S. 516, 529–30 (1982).
[103] Tyler v. Hennepin Cnty., 598 U.S. 631, 647 (2023).
[104] United States v. Miller, 317 U.S. 369, 373 (1943).

Court uses this logic when dealing with land, holding that "[w]here the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking."[105]

When states liquidate investors' securities, the owners lose "any appreciation in value; the right to receive interest or dividends; the right to vote on management recommendations; the right to participate in corporate actions; and the right to use and dispose of the property as the owner sees fit."[106] The appropriate remedy would be to allow investors to collect an amount they can use to reinvest in a similar position as if their securities had never been escheated. Some states, like New York, currently have "make whole" provisions and allow investors to collect appreciated value,[107] however, many states do not.

The RUUPA also agrees with making investors whole, containing a "make whole" provision that would compensate investors based on the value their securities are worth when they collect their accounts, if within six years of escheatment, plus dividends, interest, and other increments on the security up to the time the claim is paid.[108] Sadly, many states ignore this provision of the RUUPA, enacting legislation that does not allow property owners to be made whole.[109] To make matters worse, once investors learn that a state has liquidated their securities and they collect their account, they are required to pay tax on the sale, and if the account was tax-advantaged, they are required to pay penalties.[110]

Unclaimed property laws serve the primary purpose of protecting investors' accounts while unclaimed. However, prompt liquidation without a "make whole" provision and adequate notice causes investors to lose out on significant appreciated value, without appropriate due process and an opportunity to contest. "Make whole" provisions alleviate the harms of inadequate notice, use of inactivity standards, and shortened dormancy periods, allowing investors to collect the appreciated value of their investment accounts after states have safeguarded the accounts, meeting the primary purpose of unclaimed property laws.

VI. STATES ARE USING CONTINGENCY FEE-BASED AUDITORS

The last significant issue with the current state securities escheatment landscape is states' use of contingency fee-based audit firms. Most states lack the resources to conduct their own audits of unclaimed property, so they

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[105] Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 356 (1923).
[106] Brief for S'holder Servs. Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Petitioners, *supra* note 50, at 11.
[107] Millar et al., *supra* note 37.
[108] Unif. Unclaimed Prop. Act § 703(a) (UNIF. L. COMM'N 2016).
[109] Borden, *supra* note 45.
[110] Whipple, *supra* note 12, at 489.

hire firms to conduct audits for them, and these firms are paid fees contingent on the value of property they characterize as escheatable.[111]

Contingent-fee auditors push for new regulatory standards aimed at allowing states to escheat more property, which in turn increases amounts paid to auditors, creating an obvious conflict of interest.[112] The contingency fee auditors interpret state unclaimed property law in favor of increased escheatment, and "are known for taking liberties with unclaimed property laws, harassing holders and inflating the values of assessments."[113] This can be a lucrative business for the auditors, one firm in Delaware earned $53 million in one year.[114]

The states "lack the necessary expertise in unclaimed property matters, and thus give substantial deference to the contract audit firm."[115] The Investment Company Institute has stated that some state administrators, unfamiliar with their own laws, turn to the guidance of the contingency fee auditors – who have a pecuniary interest in an escheatment favorable interpretation – when interpreting unclaimed property law.[116] Not only do states rely on contingency fee auditors for guidance on their own laws, auditors provide "consulting services for state unclaimed property administrators, such as auditor training programs, organizational development and program enhancement, consulting and legislative guidance."[117]

This is a clear conflict of interest. An individual is deprived of due process when the entity interpreting the law applicable to them also has a

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[111] Saltzman, *supra* note 29.
[112] Investment Company Institute, Comment Letter on Revised Uniform Unclaimed Property Act (Dec. 29, 2014), https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&communitykey=4b7c796a-f158-47bc-b5b1-f3f9a6e404fa&defaultview=&libraryentry=dcf42aa0-7712-4793-af5f-9ff7a697546e&libraryfolderkey=&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=row [https://perma.cc/ZN6Q-7YWE].
[113] McDermott Will & Emery et al., *An End to the Madness? Delaware Bill Introduced to End Contingent Fee Unclaimed Property Audits*, INSIDE SALT (May 20, 2014), https://www.insidesalt.com/2014/05/an-end-to-the-madness-delaware-bill-introduced-to-end-contingent-fee-unclaimed-property-audits/ [https://perma.cc/FG7M-T9UH].
[114] Jonathan Starkey, *Abandoned property: Millions for Markell-linked firms*, DEL. ONLINE J. (May 17, 2014, 3:33 PM), https://www.delawareonline.com/story/news/local/2014/05/17/sunday-preview-markell-supporters-reap-millions-state-work/9218179/ [https://perma.cc/FHM8-AG6G].
[115] Millar et al., *supra* note 37.
[116] Investment Company Institute, *supra* note 112 ("[W]hen the Institute (and others) have contacted the states' unclaimed property administrators to discuss the application of the states' laws that these auditors are attempting to enforce – *the state administrators are unable to explain the specific provisions of their law . . . and, instead, defer to the judgment of their third-party auditors*.") (emphasis in original); Brief for S'holder Servs. Ass'n & Sec. Transfer Ass'n as Amici Curiae Supporting Petitioners, *supra* note 50, at 13–14 ("[S]tates frequently modify their criteria for when securities should be deemed escheatable via administrative proclamation. These position modifications are often at the urging of private contractors whose compensation is contingent upon the value of the property they report to the states as allegedly abandoned property.").
[117] Saltzman, *supra* note 29, at 1608.

monetary interest in the outcome.[118] Both the states and the firms benefit when the contingency fee auditors interpret unclaimed property in favor of escheatment and the firms have a clear monetary reason to do so.[119] States hoping to receive more unclaimed property have an interest in hiring contingency fee auditors; in Kentucky, the hiring of contingency fee auditors resulted in more unclaimed property collected in one year than the past four years combined.[120] The Third Circuit recognized that contingency based audit firms create a constitutionally justiciable issue, calling the issue a "biased adjudicator claim."[121]

Firms having a monetary interest in interpreting state law can cause them to develop a "bounty hunting mentality."[122] The Georgia Supreme Court agreed with this reasoning in the context of tax, stating:

> W]e hold the contract void as against public policy, not because of the services performed, but because of the contingency scheme of compensation for those services. . . . [T]he government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of the tax collected. . . .… The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.[123]

Despite a clear conflict of interest, the state courts are split on this issue: the Wyoming Supreme Court and the Connecticut Superior Court agreed with Georgia that contingency fee arrangements violate public policy, but

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[118] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.").
[119] Saltzman, *supra* note 29.
[120] *Id* (citing Michael Quinlin, *Amendment Passed on Unclaimed Money Audits*, COURIER-J. (Mar. 14, 1998)).
[121] Plains All Am. Pipeline L.P. v. Cook, 866 F.3d 534, 545 (3d Cir. 2017).
[122] Saltzman, *supra* note 29, at 1608.
[123] Sears, Roebuck & Co. v. Parsons, 260 Ga. 824, 824 (1991); *see* Saltzman, *supra* note 29, at 1608 (recognizing tax and unclaimed property are different, but analogy to contingent fee auditors is relevant).

the Kansas and North Carolina Supreme Courts have upheld contingency fee arrangements.[124] In 2017, the Third Circuit recognized that Delaware's use of contingency fee auditors presented a "biased adjudicator claim" that was justiciable on due process concerns, and remanded the case to the district court.[125] The Supreme Court, although silent on the issue of contingency fee auditors, has held that a government actor that imposes penalties and also has a direct interest in the outcome violates due process, and is against general principles of fairness and impartiality.[126] There will likely be more cases on the constitutionality of contingent fee auditors in the future.

Contingent fee auditors have become increasingly aggressive as they both help states interpret unclaimed property laws and benefit from increasing escheatment; in one Delaware case, the court concluded that Delaware and its audit firm "engaged in a game of 'gotcha' that shocks the conscience"[127] and violated a holder's due process, after the audit firm earned "over $200 million from its contingent-fee arrangement with Delaware over the course of a decade, and provid[ed] lucrative retirement deals for several former high-level unclaimed property officials, including the Delaware State Escheator himself and a Deputy Attorney General."[128] Contingent fee auditors pose a significant problem to investors, as they are likely to interpret escheatment law in favor of increasing escheatment, amplifying the issues with the current escheatment framework and ignoring the purposes of unclaimed property law: safeguarding owners' property and reunification.

VII. SOLUTIONS

A. Make Whole Provisions

First, states should include "make whole" provisions in their escheatment law. "Make whole" provisions allow investors to collect the appreciated value of their securities when they learn of escheatment, not the value states received when they liquidated the securities. This would eliminate the harm of shortening dormancy periods, lack of notice before liquidation, and use of inactivity standards because, if investors have their accounts escheated and liquidated after a short amount of time because they

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[124] *See* MacDougall v. Bd. of Land Comm'rs., 49 P.2d 663, 668 (Wyo. 1935); *see also* Yankee Gas Co. v. City of Meriden, No. X07-CV960072560S, 2001 WL 477424, at *21–*22 (Conn. Super. Ct. Apr. 20, 2001) (discussing the constitutionality of contingency fee-based arrangements); *but see* Phillip Morris U.S.A., 436 S.E.2d 828, 831 (N.C. 1993); Dillon Stores v. Lovelady, 855 P.2d 487, 491 (Kan. 1993) (upholding the use of contingency fee contracts).

[125] *Plains All Am. Pipeline L.P.,* 866 F.3d at 545.

[126] *See* William S. King, *A Bridge Too Far: Due Process Considerations in State Unclaimed-Property Law Enforcement*, 45 SUFFOLK U.L. REV. 1249, 1259 (2012) (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

[127] Temple-Inland, Inc. v. Cook, 192 F. Supp. 3d 527, 550 (D. Del. 2016).

[128] Miller, et al., *supra* note 37 (*citing* Jonathan Starkey, *Del. Senate Passes Unclaimed Property Bill*, DEL. ONLINE (Jan. 22, 2015, 5:03 PM), https://www.delawareonline.com/story/firststatepolitics/2015/01/22/senate-abandoned-property/22176233/ [https://perma.cc/4XY7-TP39]).

are "inactive," they can still receive the value of their account as if it had never been escheated. Once they learn that their investments have been escheated, investors can receive the appreciated value of their investments and reinvest in a similar position, meeting the "just compensation" requirement of the Fifth Amendment. Investors would be made whole or compensated enough to reinvest in their original investment position.

"Make whole" provisions would still allow states to use large amounts of escheated and liquidated securities for public use. While not the primary purpose of unclaimed property law, states can use money from liquidating escheated property for public benefit. Because most investors never learn of escheated property and, therefore, never collect their accounts from the state, the state can still use the large amounts of unclaimed property that never gets collected for public use. While "make whole" provisions would likely diminish the amount states could use, states would still have access to very large funds, as most would not get collected. New York, for example, has a "make whole" provision in their state law, and still has $19 billion in unclaimed money.[129] However, when investors learn that their accounts have been escheated, they should be able to collect the amount their securities would have been worth absent escheatment. This would be a win-win for both states and investors; states can keep the large amounts of property that never gets claimed and use it for public use, and investors can collect appreciated values if they learn that their property has been escheated. States should be able to compromise and allow investors to be made whole and still have large amounts of money received from liquidation of escheated property for public use.

The RUUPA also proposes a "make whole" provision for states to adopt that provides that owners will either get the same securities they had escheated or the current fair value of the securities plus interest, and dividends, if they collect their accounts within six years of escheatment.[130] Nonetheless, many states do not follow the guidance of the RUUPA and neglect to enact "make whole" provisions.[131] The combination of short dormancy periods with prompt liquidation and lack of "make whole" provisions is what makes the landscape particularly hostile towards investors. "Make whole" provisions are the best way to fix the landscape.

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[129] *Unclaimed Funds Fact Sheet*, OFFICE OF THE NEW YORK STATE COMPTROLLER, https://www.osc.ny.gov/files/unclaimed-funds/resources/pdf/fact-sheet.pdf [https://perma.cc/FLP5-NZMS] (last visited Jan. 10, 2024) (New York returned $504 million in 2024, far short of the 19 billion in the state's possession); Millar et al., *supra* note 37.

[130] *See* Unif. Unclaimed Prop. Act § 703(a) (UNIF. L. COMM'N 2016).

[131] *See* Borden, *supra* note 45 (explaining the difficulties faced when trying to reclaim property with aggressive unclaimed property laws).

B. Federal Involvement

1. Supreme Court

While the best answer is "make whole" provisions, if the states refuse to make investors whole, or otherwise do not change the current framework, it is in the best public interest of investors for the federal government to review the constitutionality of state escheatment or provide better guidance in the form of legislation or regulation. Justice Alito wrote in a concurrence in the denial of certiorari for *Taylor v. Lee*, an appeal dealing with the constitutionality of California's state escheatment framework, that "[t]he convoluted history of this case makes it a poor vehicle for reviewing the important question it presents, and therefore I concur in the denial of review. But the constitutionality of current state escheat laws is a question that may merit review in a future case."[132] The Supreme Court should review the constitutionality of current state aggressive escheatment and set an investor friendly precedent for states to follow. While unclaimed property has historically been a state issue, the Supreme Court has settled unclaimed property issues in the past.[133] If the Supreme Court were to set a bright-line test for what is considered constitutional escheatment, states would have a guideline to refer to without having to refer to the guidance of auditing firms who have a pecuniary interest. Investors could rest easy if the Supreme Court were to implement a constitutional guide for escheatment and would not have to worry about vastly different state laws with varying levels of investor protection.

2. Securities and Exchange Commission

In an alternative to a Supreme Court ruling, the Securities and Exchange Commission should step in and provide further clarification concerning state securities escheatment. The SEC should promulgate more regulations, such as regulation 240.17Ad-17, affording protections to investors in contrast to aggressive state escheatment to combat significant harms investors face with the current framework.

The SEC has not been silent recently on the issue of state escheatment and has acted against DST Asset Manager Solutions, Inc., a Massachusetts transfer agent in 2023.[134] The SEC fined DST $500,000 because DST failed to act in accordance with 17 C.F.R. § 240.17Ad-17 and conduct reasonable searches, causing 78 investors to have their accounts wrongfully escheated losing a total of $651,433.[135] These kinds of SEC actions are necessary to facilitate better investor protection, and indicate that the SEC may be able to provide more guidance on investor protection in the context of escheatment. It is time for the SEC to promulgate new regulations concerning escheatment

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[132] Taylor v. Yee, 136 S. Ct. 929, 929–930 (2016) (Alito, J., concurring in denial of certiorari) (the issue being the constitutionality of California's current escheatment laws).
[133] *See, e.g.*, Texas v. New Jersey, 379 U.S. 674 (1965).
[134] DST Asset Manager Sols., Inc., Exchange Act Release No. 34-98153 (Aug. 17, 2023).
[135] *Id.*

of securities, to prevent investors from having their accounts unjustly escheated and liquidated.

States may argue that because unclaimed property law is a state issue, the Supreme Court or the SEC regulating state escheatment is a preemption of state laws. The Supreme Court held in *Tyler v. Hennepin County*, however, that while "[s]tate law is one important source [,][of property rights] . . . state law cannot be the only source [,] [o]therwise a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[136] This is precisely the case here, as states are escheating increasing amounts of securities, and they have a pecuniary interest in doing so. If the constitutionality of the current unclaimed property framework is left solely to the states, they have motives to affirm the current landscape, and enact legislation to make unclaimed property laws more escheatment friendly. As mentioned above, states also take much of their guidance on unclaimed property law from their own auditor firms, who also have a pecuniary interest in escheatment-friendly law. Therefore, an argument of preemption is not convincing; the states cannot be the sole judge on whether their own escheatment law meets constitutional standards. The Supreme Court or SEC should help regulate the current state escheatment framework to prevent one-sided interpretations of law from interested parties.

VIII. CONCLUSION

The current state escheatment landscape is unfriendly towards investors and will lead to vast amounts of investors unknowingly having their securities escheated and liquidated. Like Walter Schramm, investors who buy investment accounts and hold them for years will return to their accounts and, instead of seeing significant appreciated value, will see nothing.[137] Unfortunately, under the current framework, investors are required to take steps to remain "active" and prevent their accounts from being escheated. What is the consequence of not remaining active? Liquidation without constitutional notice. Moreover, when investors seek compensation, they are given only the value when escheated. This should not be the case. States should not be using escheated property for public use at the expense of investors losing their investments. Investing is necessary, and many Americans rely on investing to retire. Investors should not be worried that without some regular level of activity, they will have their investments escheated and liquidated without the opportunity to collect the appreciated value.

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[136] Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1375 (2023) (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)).
[137] Planet Money, *supra* note 1.

States should be willing to make investors whole after escheatment and allow them to collect appreciated value. In the absence of that remedy, the federal government should set a constitutional standard for escheatment or promulgate regulation aimed at increased investor protection.